Supreme Court, U. S.
FILED
SEP 30 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1383

CHRISTIANSBURG GARMENT COMPANY,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

JACK GREENBERG
JAMES M. NABRIT, III
CHARLES STEPHEN RALSTON
MELVYN R. LEVENTHAL
ERIC SCHNAPPER
10 Columbus Circle
New York, New York 10019

Attorneys for Amicus Curiae

INDEX

	Page
Interest of Amicus	1
Summary of Argument	3
Argument.	4
I. An Award of Counsel fees to Defendants in Cases Brought the Civil Rights Act Is Inconsistent with Newman v. Piggie Park Enterprises.	4
II. A Different Standard for Award of Counsel Fees to Plaintiffs and Defendants Is Required By the Policy Considerations Enunciated In the Civil Rights Acts and Is Not Inconsistent With the language of Title VII	12
Conclusion	21

Table of Authorities

Cases:

Albermarle Paper Co. v. Moody, 422 U.S.405 (1975)	2
Alyeska Pipeline Service Co.v. Wilderness Society, 421 U.S. 240 (1975)	17,18
Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974)	3,7,14
Brown v. Gaston County Dyeing Mach. Co., 457 F.2d 1377 (4th Cir. 1972)	11
Byram Concretanks, Inc. v. Warren Concrete Products Co., 374 F.2d 649 (3rd Cir.1967)	16

	Page
Carrion v. Yeshiva University, 535 F.2d 722 (2d Cir. 1975)	13,19
Donaldson v. Pillsbury Co., 554 F.2d 825 (8th Cir. 1977)	11
Fleischmann v. Maier Brewing Co., 386 U.S. 714 (1967)	8
Ford v. United States Steel Corp,520 U.S. 1043 (5th Cir. 1975)	9
Griggs v. Duke Power Co., 401 U.S. 424 (1971)	2,4,11
International Brotherhood of Teamsters v. United States,____ U.S.____, 52 L.Ed.2d 396 (1977)	11
Johnson v. Georgia Highway Express Co., 488 F.2d 714 (5th Cir. 1974)	7
Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974)	9
Johnson v. Railway Express Agency, 421 U.S. 454 (1975)	2,11
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	2
NAACP v. Button, 371 U.S.415 (1963)	6
Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968)	passim
Northcross v. Memphis Board of Education, 412 U.S. 427 (1973)	3,7,14

	Page
Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971)	2
Rich v. Martin Marietta Corp., 522 F.2d 333 (10th Cir. 1975)	10,11
Robinson v. Lorrillard Corp., 444 F.2d 791 (4th Cir. 1971)	7
Rodgers v. United States Steel Corp., 508 F.2d 152 (3rd Cir. 1975)	9
Rosenfeld v. Southern Pacific Co., 519 F.2d 527 (9th Cir. 1975)	7
Sherrill v. J.P. Stevens & Co., 410 F.Supp. 770 (W.D.N.C. 1975)	9
United Air Lines v. Evans,____U.S.____, 52 L.Ed. 2d 571 (1977)	11
United States Steel Corp. v. United States, 519 F.2d 359 (3rd Cir. 1975)	13,19
Watkins v. Scott Paper Co., 530 F.2d 1159 (5th Cir. 1976)	5,11
Wright v. Stone Container Corp., 524 F.2d 1058 (8th Cir. 1975)	13
Other Authorities:	
42 U.S.C. §1981	17,20,21
42 U.S.C. §1982	17
42 U.S.C. §1983	17
42 U.S.C. §2000e-5(k)	6

	Page
H. Rep. No. 94-1558, 94th Cong., 2d Sess. (1976)	17
110 Cong. Rec. 12722 (June 4, 1964)	6
122 Cong.Rec. H12161 (daily ed.Oct.1,1976)	21
122 Cong.Rec. H12162 (daily ed.Oct.1,1976)	20
122 Cong.Rec. H12165 (daily ed.Oct.1,1976)	17
122 Cong.Rec. S16491 (daily ed.Sept.23,1976)	20
S.Rep. No.94-1011, 94th Cong.2d Sess., (1976)	17,18
20 U.S.C. §1617	7,17

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977
No. 76-1383

CHRISTIANSBURG GARMENT COMPANY,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS AMICUS CURIAE

Interest of Amicus*

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid and gratuitously to Negroes suffering injustice by

---

*Letters of consent to the filing of this Brief from counsel for the petitioner and the respondent have been filed with the Clerk of the Court.

reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf. The charter was approved by a New York Court, authorizing the organization to serve as a legal aid soceity. the NAACP Legal Defense and Educational Fund, Inc. (LDF), is independent of other organizations and is supported by contributions from the public. For many years its attorneys have represented parties in this Court and the lower courts, and it has participated as amicus curiae in this Court and other courts, in cases involving many facets of the law.

Attorneys for the Legal Defense Fund have handled many cases involving Title VII of the Civil Rights Act of 1964 and discrimination in employment generally.* In addition, the Fund has been primarily responsible for the development of the law regarding counsel fee awards under the various Civil Rights Acts having represented plaintiffs in the leading cases of Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968);

*E.G.. Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971); Griggs v. Duke Power Co., 401 U.S. 424 (1971); McDonnell Douglas v. Green, 411 U.S. 792 (1973); Johnson v. Railway Express Agency, 421 U.S. 454 (1975); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

Northcross v. Memphis Board of Education, 412 U.S. 427 (1973); and Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974). As counsel for plaintiffs in civil rights cases we have a direct interest in the resolution of the question before the Court in this case.

SUMMARY OF ARGUMENT

I.

The award of counsel fees to prevailing Title VII defendants as a matter of course would have a chilling effect on the filing of complaints by plaintiffs, regardless of the merits of their cases. Such a result is precluded by this Court's decision in Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968), which held that the purpose of the counsel fee provisions in the Civil Rights Act of 1964 was to "encourage individuals injured by racial discrimination to seek judicial relief."

II.

Congress intended to encourage the bringing of private lawsuits to enforce the provisions of the 1964 civil rights act. On the other hand, it sought to discourage frivolous and vexatious litigation by allowing counsel fees to prevailing defendants under those limited circumstances. The counsel fee provision in Title VII must be

read in light of the intent of Congress as expressed both in 1964 and in more recent civil rights counsel fee enactments.

ARGUMENT

I.

An Award of Counsel Fees to Defendants in Cases Brought Under the Civil Rights Act Is Inconsistent with Newman v. Piggie Park Enterprises.

The resolution of the issue raised by the present case, whether prevailing defendants in Title VII actions are to receive counsel fees on the same basis as are prevailing plaintiffs, will determine whether or not Title VII of the Civil Rights Act of 1964 remains as a viable remedy for those on whose behalf it was passed. Title VII involves complex and difficult issues, particularly in cases that are brought as across-the-board class actions challenging systemic practices of employers. From the time of the filing of the complaint to the completion of trial, up to 5 years may be required because of the difficult problems such litigation presents. Thus, the plaintiffs must be prepared to analyze in depth a variety of practices that may impinge on employment opportunities, including tests,[1/]

2/ See, e.g., Griggs v. Duke Power Co, 401 U.S. 424 (1971).

methods of promotions[2/] and the like. Statistical and computer analyses of data, the use of expert witnesses to analyze information, to testify concerning the validity of tests, and to suggest alternative ways of organizing a work force so as to remove obstacles to equal employment opportunities are essential parts of litigation.

Needless to say, the bringing and maintaining of such litigation involves substantial resources not only in personnel but in funds. Lawyers' fees and expenses, expert witness fees and expenses, salaries of research analysts and computer personnel, and other funds expended as ordinary costs of litigation must be found. Such resources are far beyond the reach of ordinary Title VII plaintiffs, who are most likely blue collar workers at the lowest rung in the salary scale. Indeed,it is because of their position economically that such workers have sought out the aid of the courts to achieve equality of opportunity for themselves and others similarly situated. Even in class actions, groups of workers rarely have the funds necessary to carry out their side of the litigation with-

---

2/ See, e.g., Watkins v. Scott Paper Co., 530 F.2d 1159 (5th Cir. 1976).

out the assistance of organizations such as the Legal Defense Fund. Thus, their own lawyers are either on the staff of a civil rights organization, or are attorneys in private practice working in cooperation with such organizations who receive only a minimal fee (see, e.g., NAACP v. Button, 371 U.S. 415 (1963)), but who do have the expectation of an eventual award of counsel fees under 42 U.S.C. §2000e-5(k).

It was precisely these concerns - the burden on privarte plaintiffs - that led Congress to enact a counsel fee provision as part of Title VII.[3/] In Newman v. Piggie Park Enterprises,

---

3/ Congress recognized at the time it passed the Civil Rights Act of 1964 that a significant part of the burden of enforcing the Act would fall on private plaintiffs. Although the legislative history of the counsel fee provisions in the Civil Rights Act of 1964 is not lengthy, it indicates that Congress' main concern was to provide an incentive for plaintiffs to file lawsuits to enforce the rights established by the Act. Thus, concern was expressed over the fact that private plaintiffs lacked resources to bring and presecute the kind of actions that would be necessary under the Act. The counsel fee provisions were inserted for the specific reason to provide fee shifting so that a successful plaintiff would be able to obtain his counsel fees. See, 110 Cong. Rec. 12722 June 4, 1964).

390 U.S. 400 (1968), this Court held that the Congressional purpose of encouraging private enforcement of the national policy embodied in Title II of the Civil Rights Act of 1964 required that counsel fees be awarded to prevailing plaintiffs as a matter of course. This rule has subsequently been applied by this Court to private actions brought to integrate schools within the scope of 20 U.S.C. §1617 (Northcross v. Memphis Board of Education, 412 U.S. 427 (1973); Bradley v. Board of Ed. of Richmond, 416 U.S.696 (1974)), and by the courts of appeals in cases arising under Title VII of the Civil Rights Act of 1964 (see, e.g., Johnson v. Georgia Highway Express Co., 488 F.2d 714 (5th Cir. 1974)); Robinson v. Lorrillard Corp., 444 F.2d 791 (4th Cir. 1971); Rosenfeld v. Southern Pacific Co., 519 F.2d 527 (9th Cir. 1975)).

We urge that the award of counsel fees to defendants as a matter of course is precluded by this Court's decision in Newman and would be clearly inconsistent with Congressional intent in enacting the counsel fees provisions as part of the various civil rights acts.

In the first place, it is obvious that given the fact that Title VII plaintiffs usually cannot afford to bear the costs of their own side

of litigation, it would be impossible for them to bear the costs of the defendant's side as well.[4/] This, however, is the result sought by the petitioner in the present case. The Court must keep in mind that this case arises in a posture which may not present this particular problem, since it involves an agency of the federal government. The Equal Employment Opportunity Commission, of course, does not have the economic problems faced by private Title VII plaintiffs. However, the arguments made by petitioner would apply with equal force to cases brought by private plaintiffs, and therefore the Court must decide the issue in the light of the policy considerations that led Congress to pass the attorneys' fees provision to begin with as decided by Newman.

4/ Indeed, this Court has explained one of the rationales for the prevailing American rule in terms of the effect of routine fee-shifting on poor litigants:

> In support of the American rule, it has been argued that since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel. Fleischmann v. Maier Brewing Co., 386 U.S. 714, 718 (1967).

The effect of the threat of paying counsel fees to a defendant who prevails in a Title VII action as a matter of course will necessarily mean that many plaintiffs who may have valid claims, or whose claims are substantial enough to warrant full consideration by the courts, will simply either not bring law suits or will so restrict their law suits as to render enforcement of the Act ineffective. Civil rights attorneys in advising potential plaintiffs whether or not to bring an action will have no choice but to warn them that they may become personally liable for the counsel fees and expenses of their adversaries even when those adversaries have enormous resources.[5/] An attorney could not in good conscience permit plaintiffs of limited resources to be driven to bankruptcy if they do not prevail.

These concerns are not speculative, but arise from our experiences since 1965, the effective date of Title VII, in handling hundreds of Title VII actions against employers ranging from the United States Steel Corporation to

---

5/ See e.g., Ford v. United States Steel Corp., 520 U.S. 1043 (5th Cir. 1975); Rodgers v. United States Steel Corp., 508 F.2d 152 (3rd Cir. 1975); Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974); Sherrill v. J.P. Stevens & Co., 410 F.Supp. 770 (W.D.N.C. 1975).

smaller concerns, and from the largest industrial unions down to small locals. The issue must be viewed from the perspective of the plaintiff and of plaintiff's counsel in light of the Newman ruling that the purpose of the counsel fee provision is to encourage litigation.

A plaintiff has no assurance that he will prevail when he, or she, is deciding whether to initiate litigation. His access to facts is limited; typically, he only knows that he has not gotten a job or promotion. The underlying facts are in the possession of the prospective defendant and can only be obtained after discovery.[6/] Even after the raw data has been obtained, sophisticated analysis is required to determine precisely in what ways employment practices deny equal opportunity.

The law of Title VII has developed gradually and has taken dramatic shifts from time to time.[7/] Thus, it is difficult for a plaintiff

---

6/ See, e.g., Rich v. Martin Marietta Corp., 522 F.2d 333, 342-45 (10th Cir. 1975).

7/ For example, only last term this Court held, contrary to most courts of appeals, that seniority systems did not violate Title VII if they simply perpetuated the effects of pre-Act discrimination in the absence of an intent to discriminate. International Brotherhood of Teamsters v.

to predict that a case will be won even if the facts seem clear. Similarly, district court judges themselves often err in deciding cases, requiring reversal by the appellate courts.[8/] If a court, after a full trial of the evidence can make a mis-judgment, a plaintiff should not be penalized if he assesses his case wrongly before a complaint is ever filed.

Even though a plaintiff may have a valid claim on the merits, he may lose becasuse of a procedural bar not easily foreseen.[9/] Also to be considered is the result if a plaintiff prevails on some issues but not all. Are counsel fees to be apportioned, so that those

---

7/ Cont'd.
United States, ____ U.S. ____, 52 L.Ed.2d 396 (1977)).

8/ See, e.g., Griggs v. Duke Power Co., 401 U.S. 424 (1971); Brown v. Gaston County Dyeing Mach. Co., 457 F.2d 1377 (4th Cir. 1972); Watkins v. Scott Paper Co., 530 F.2d 1159 (5th Cir. 1976); Donaldson v. Pillsbury Co., 554 F.2d 825 (8th Cir. 1977); Rich v. Martin Marietta Corp., 522 F.2d 333 (10th Cir. 1975).

9/ See, e.g., Johnson v. Railway Express Agency, 421 U.S. 454 (1975); United Air Lines v. Evans, ____ U.S. ____, 52 L.Ed.2d 571 (1977).

awardable to indigent plaintiffs are cancelled out by those awardable to a corporate defendant?

To catalogue the difficulties facing a prospective Title VII plaintiff and his counsel in trying to foresee whether they will ultimately be successful, is to demonstrate the destructive effect of the rule argued for by petitioner here. In short, the only purpose and effect a rule awarding counsel fees to prevailing defendants as a matter of course would be to discourage and chill the private enforcement of Title VII. Such a result would be totally inconsistent with Newman and, as will be shown below, with Congressional policy.

II.

A Different Standard for Award of Counsel Fees To Plaintiffs and Defendants Is Required By The Policy Considerations Enunciated in the Civil Rights Acts and Is Not Inconsistent With the Language of Title VII.

As discussed above, Congress' purpose in enacting a counsel fee provision as part of Title VII was to encourage plaintiffs to bring litigation. Clearly, a provision which would give counsel fees as a matter of course to prevailing defendants would defeat the congressional purpose,

since potential plaintiffs would have to weigh the possibility of an award of significant attorneys' fees against them even in a case which presented substantial issues and which deserved to be filed and prosecuted in court. The lower courts have therefore adopted the rule that the standard for assessing fees is different for plaintiffs and defendants. Thus, in conformity with Newman v. Piggie Park Enterprises, supra, they have held that a prevailing defendant may obtain counsel fees only when the court finds that the action was brought in bad faith, for vexatious reasons, and for the purpose of harassment. See, e.g., Carrion v. Yeshiva University, 535 F.2d 722 (2d Cir. 1976); United States Steel Corp. v. United States, 519 F.2d 359 (3rd Cir. 1975); Wright v. Stone Container Corp., 524 F.2d 1058 (8th Cir. 1975).

Petitioner seeks to refute these decisions by maintaining that the plain meaning of the statute shows that the standard for both plaintiffs and defendants is to be the same; i.e., since the statute makes no distinction on its face, no distinction can be read into it by the courts. We would urge that the statute is not nearly as plain as petitioner contends, and that the problem with petitioner's position is that

it focuses on the wrong part of the statute. The fact that both parties may get counsel fees on some occasions, does not in any way, as petitioner contends, mean that they are to get them on the same basis. The part of the statute which deals with that question is the language stating that the court may "in its discretion" award fees.

The question then becomes what standards are to govern the court's discretion in a particular case. The statute does not speak to that specifically, certainly not in its language, and it is wholly appropriate to turn to the legislative history for guidance as to what the standards for the exercise of discretion should be. When one does so, it becomes apparent that the standards should not the same if the court is deciding whether to grant counsel fees for the plaintiff as opposed to granting them for the defendant. As this Court has discussed in Newman v Piggie Park, supra, as well as in cases following it dealing with other counsel fees statutes in civil rights cases, such as Northcross v. Memphis Board of Education, 412 U.S. 427 (1973) and Bradley v. School Board of Richmond, 416 U.S. 696 (1974), the standard for prevailing plaintiffs is that counsel fees are

to be awarded except in unusual circumstances so that the Congressional purpose of encouraging litigation would be carried out. As we have discussed at length above, to allow counsel fees as a matter of curse to prevailing defendants would have exactly the opposite effect and would discourage litigation, and thus run contrary to congressional purpose. Discouraging frivolous or vexatious litigation, however, is wholly consistent with congressional purpose, both because no valid purpose at all would be furthered by such litigation, and by discouraging it the courts would be free to focus their attention on those cases which present substantial issues arising under the civil rights laws.[10/]

10/ During the Congressional debates, concern was expressed that the counsel fees provision could encourage "ambulance chasing", and could lead to the bringing of frivolous law suits for the purpose of obtaining a fee. In response, it was pointed out that the "prevailing party" language would permit an award to defendants in vexatious and insubstantial suits and thus discourage the bringing of totally unmeritorious litigation. See, 110 Cong. Rec. 14201, 14213-14 (June 17, 1964).

Petitioner presents another argument that allegedly supports its reading of the statute. That is, if the standard for defendants is harassment, bad faith, or vexatious litigation, there is no need to have the statute read "prevailing party", since the defendant would be entitled to counsel fees under that standard pursuant to the American rule in any case. Thus, it is argued, the statute would have no meaning with regard to defendants. This conclusion does not follow, however. If the statute read "prevailing plaintiffs" and counsel fees awards were limited to such plaintiffs, then the statute would bar counsel fees on behalf of defendants under all circumstances. Under such a reading, the American rule would be abrogated for defendants in civil rights cases since even in instances where litigation was frivolous or brought in bad faith they could not be awarded by the courts.[11/]

It is certainly clear that Congress's view now is that the standard should be different for

---

11/ See, e.g., Byram Concretanks, Inc. v. Warren Concrete Products Co., 374 F.2d 649 (3rd Cir. 1967).

plaintiffs and defendants in civil rights cases. In 1976 Congress passed the Civil Rights Attorneys' Fees Act of 1976, designed to fill gaps created by the decision of this Court in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). In that decision, this Court disapproved decisions of the lower federal courts applying the "private attorneys general" standard, enunciated with regard to Title II and 20 U.S.C. §1617, to actions brought under 42 U.S.C. §1981, 1982 and 1983, the post-Civil War Reconstruction civil rights acts.[12/] Congress was concerned that this result created an anomaly in that under the post-1964 civil rights acts fees were awarded to plaintiffs as a matter of course, whereas in pre-1964 civil rights act cases counsel fees were awardable only under the much more restrictive American rule. As was pointed out in the committee reports, and often during the debates on the 1976 Act, employment discrimination cases could be brought either under §1981 or under Title VII.[13/] However, under the

---

12/ 421 U.S. at 270, n.46.

13/ See H. Rep. No.94-1558, 94th Cong., 2d Sess., pp. 2-5 (1976); S. Rep. No. 94-1011, 94th Cong., 2d Sess., pp. 1-4 (1976); 122 Cong. Rec. H12165 (daily ed. Oct.1, 1976)(Remarks of Rep. Seiberling).

Alyeska decision, counsel fees were awardable only under Title VII. Thus, even though an action might deal with the same issues and serve exactly the same public purpose, counsel fees could not be obtained.

It was specifically to clear up this anomaly and to bring about uniformity for all civil rights actions with regard to counsel fees that the 1976 Act was passed.[14/] During the course of the enactment of the statute, in both the House and the Senate extensive attention was given to decisions of this and the lower courts interpreting the counsel fees provisions under the post-1964 Civil Rights Acts. Newman v.

14/ The Senate Report stated the purpose of the Act thus:

> This amendment to the Civil Rights Act of 1866, Revised Statutes Section 722, gives the Federal courts discretion to award attorneys' fees to prevailing parties in suits brought to enforce the civil rights acts which Congress has passed since 1866. The purpose of this amendment is to remedy anomalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), and to achieve consistency in our civil rights laws. S. Rep. 94-1011, 94th Cong. 2d Session, p. 1 (1976).

Piggie Park Enterprises, supra, was cited as establishing the proposition that plaintiffs were to be given counsel fees as a matter of course when they prevailed.[15/] Contrariwise, the decisions in Carrion v. Yeshiva University, supra and United States Steel Corp.v. United States, supra, were cited as establishing that the standard for defendants was different.[16/] That is, defendants were to obtain counsel fees only when the action was found to be brought in bad faith and for harassment.

Indeed, during the debates the question was raised as to whether it was necessary to specify "prevailing parties" if all the defendants could get what they were entitled to under the American rule to begin with. The answer was given that it was not the Act's intent to foreclose defendants from getting counsel fees under all circumstances. It was pointed out that the United States had suggested to the House committee that counsel fees be limited to "prevailing plaintiffs". The suggestion was rejected because Congress still wished to deter frivolous lawsuits by plaintiffs,

---

15/ See, e.g., id. at p. 3.

16/ See, id. at p. 5.

and thus allow defendants to get attorneys fees under the standard which prevailed under the American rule.17/

In both the Committee reports and repeatedly on the floor of the House and the Senate the question of standards for awards of counsel fees was discussed. It was consistently stated that Congress intended that a different standard apply, that it intended that the same standard apply in the 1976 Act that was required by the courts under their interpretation of the 1964 Act,and that the purpose was to bring about uniformity with regard to all civil rights actons. Thus, given this legislative history, it is indisputable that, for example, in an action brought under §1981 for equal employment, the defendant could receive counsel fees only upon a showing of bad faith and harassment. If a contrary result were reached in the present action, however, the wholly anomalous result would be that there would again be a lack of uniformity in the standards applied in civil rights cases. Plaintiffs would simply be encouraged to file

17/ See, e.g.; 122 Cong. Rec. H12162 (daily ed. Oct.1, 1976 (Remarks of Rep. Kastenmeier); 122 Cong. Rec. S16491 (daily ed. Sept. 23, 1976) (Remarks of Sen. Tunney).

their lawsuits under §1981 and thereby not to file administrative complaints with the EEOC, avoiding Title VII completely, a result that would be wholly contrary to Congressional intent.18/

Conclusion

For the foregoing reasons, the decision of the Court below should be affirmed.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT III
CHARLES STEPHEN RALSTON
MELVYN LEVENTHAL
ERIC SCHNAPPER
10 Columbus Circle
Suite 2030
New York, New York 10019
Attorneys for Amicus Curiae

18/ Thus Rep. Railsback, one of the sponsors of the bill, stated on the floor of the House just prior to passage:"It is not the intent of Congress nor is it the intent of this statute to encourage persons to sue directly under section 1981 rather than using the services provided by the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act.Congress has established the EEOC to remedy individual complaints as well as patterns and practices of illegal discrimination and has authorized the Commission to sue on behalf of the plaintiffs." 122 Cong. Rec., H12161 (daily ed. Oct.1,1976).